

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE LIVI WELCH,

Defendant-Appellant.

---

UNPUBLISHED

June 13, 2000

No. 218603

Cass Circuit Court

LC No. 98-009342-FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was thereafter sentenced to seventeen to forty years' imprisonment. He appeals as of right and we affirm.

I

Defendant first argues that the trial court, in questioning prospective jurors concerning their ability to believe the testimony of a child over that of an adult, bolstered the credibility of the child complainant in this case.

Because defendant failed to object at trial to the trial court's voir dire, this issue has not been preserved for appeal. *People v White*, 168 Mich App 596, 604; 425 NW2d 193 (1988). Therefore, in order to avoid forfeiture of this issue, defendant must demonstrate plain error that was prejudicial, that is, error that could have affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

After reviewing the now disputed remarks of the trial court during voir dire in context of the entire voir dire, it is apparent that the trial court merely attempted to elicit the jurors' true feelings regarding whether each could determine the case impartially. Contrary to defendant's implication that in doing so the trial court bolstered the credibility of the complainant in this matter, we note that the trial court never expressed its own opinion concerning the merits of the case against defendant, nor the

credibility of any witness. Rather, the trial court repeatedly ensured that the jurors understood that it was they alone who were to judge the “believability” of the witnesses who were to testify before them.

Therefore, because we find no error in the voir dire conducted by the court at trial, defendant has failed to demonstrate a plain error that affected the outcome of the trial.

## II

Defendant next argues that the prosecutor, during his closing argument, improperly argued facts not admitted as evidence during trial and in doing so shifted the burden of proof concerning the truth or falsity of such facts to defendant. While we agree that the challenged remarks were improper,<sup>1</sup> because defendant did not object to the prosecutor’s remarks at trial, our review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

After review of the challenged remarks, we find that although the remarks were improper, any prejudice could have been cured by an instruction from the trial court prompted by a timely defense objection. Moreover, the complainant’s allegation was corroborated by defendant’s former friend who testified that defendant admitted to him that he had “sexual intercourse” with the complainant and that he had later threatened her not to tell anyone. Finally, we note that the trial court properly instructed the jury that the lawyers’ statements and arguments were not evidence and that the jury “should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.” Thus, the trial court’s instructions dispelled any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

## III

Defendant next argues that the prosecutor presented insufficient evidence to prove his guilt beyond a reasonable doubt.

In reviewing the sufficiency of the evidence, this Court considers the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

In order to establish defendant’s guilt of the charged crime, the prosecutor was required to prove that defendant sexually penetrated the complainant at a time when she was under the age of thirteen. See MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). At trial, the complainant testified that during an overnight stay at defendant’s apartment in the summer of 1996, when she was eleven years old, she awoke to find that defendant had removed her pants and had begun to penetrate her vagina with his penis. While this evidence alone, if the jury chose to believe the complainant’s testimony, was

---

<sup>1</sup> The prosecutor concedes on appeal that the challenged remarks were improper, but that the remarks were harmless.

sufficient to convict defendant of the charged crime, the prosecution also presented testimony from defendant's former friend, who indicated that defendant had bragged to him of having "sexual intercourse" with the complainant during that time period.

Defendant argues, however, that because no rational trier of fact could believe such testimony his conviction must be reversed. Specifically, defendant argues that inasmuch as the offense was alleged to have occurred while defendant's wife and child were asleep inside the apartment, and yet neither of these persons were awakened by the alleged assault, the "physical makeup of the tiny apartment" belies the testimony offered by these witnesses and thereby renders such testimony incredible. However, when addressing an issue concerning the sufficiency of the evidence this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra*, pp 514-515. In this case, if the jurors chose to believe either the testimony of the complainant or defendant's former friend, they would be justified in convicting defendant of first-degree criminal sexual conduct because the elements of the charge were established.

Therefore, we conclude that when viewed in a light most favorable to the prosecutor, the evidence presented at trial was sufficient to allow the jury to find defendant guilty of first-degree criminal sexual conduct.

#### IV

Lastly, defendant argues that his seventeen-year minimum sentence violates the principle of proportionality.

Defendant was convicted by jury of raping an eleven-year-old friend of his daughter while she was sleeping during an overnight stay at his apartment. According to the complainant, after learning that local authorities had been informed of defendant's conduct, he threatened that if she told anyone what he had done, he would find and kill her. Further, the presentence investigation report indicates that defendant was convicted in 1986 of second-degree criminal sexual conduct, also involving a minor. The presentence report also indicates that this prior conviction is significantly similar to the present offense in that in the prior case, defendant, after sexually assaulting the minor victim in her bedroom, threatened the child with violence if she were to tell anyone of his conduct. Noting this fact during sentencing, the trial court opted to impose a minimum sentence within the middle of the recommended guidelines range of ten to twenty-five years.

Considering the seriousness of the offense in conjunction with defendant's prior conviction, and the fact that the sentence is well within the minimum guidelines range, we cannot conclude that the trial court abused its discretion in sentencing defendant. *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995); *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). The sentence is not disproportionately severe. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck